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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 43

RICHARD J. BROWN,

Petitioner,

vs.

WESTERN RAILWAY OF ALABAMA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

BRIEF ON BEHALF OF RESPONDENTS

ARTHUR HEYMAN,
HUGH HOWELL, SR.,
HERMAN HEYMAN,
MORRIS B. ABRAM,
Attorneys for Respondent

HEYMAN, HOWELL & HEYMAN,
Cockrell Building,
Atlanta, Georgia

STEINER, CRUMPTON,
Montgomery, Ala.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 652

RICHARD J. BROWN,

Petitioner,

vs.

WESTERN RAILWAY OF ALABAMA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

BRIEF ON BEHALF OF RESPONDENTS

Questions Presented

Petitioner has drawn the question he presents with a very broad brush, indeed. More finely drawn, these questions can be very decisive in assisting the Court in reaching its conclusion. We, therefore, state them with more particularity:

1. Whether well established state rules of procedure apply in actions under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, et seq)?

2. Whether a petition under state rules of practice, alleging simply the following, sets out a cause of action under the Federal Employers' Liability Act?

a. That there is a large clinker lying beside the track in a railroad yard;

b. That said clinker has been there only momentarily;

c. And which does not allege that the defendant had anything to do with the clinker being in said yard. (It appearing in the petition that the yards are used by another railroad as well as the defendant and there being, in any event, no allegation of negligence in connection with the placing of the clinker).

3. Whether the above questions are matters which present "special and important reasons" for the issuance of the writ of certiorari.

a. *The special facts in this case:*

With complete candor we suggest to the Court that petitioner is mistaken when he says of this case (petitioner's brief, page 3): "In its broadest aspects it presents the question of the duty of a railroad company to remove known obstacles or hazards alongside tracks which may cause injury to railroad employees." This case is one which turned on the fact that the petition did not allege that the railroad knew or ought to have known of the presence of the offending clinker. It cannot, therefore, possibly present the question above raised by petitioner. With all due regard for petitioner's counsel, we do not understand the assertion that this case presents the question of a railroad's duty to "remove known obstacles or hazards" (petitioner's brief, page 3). We have never doubted the duty of a railroad to remove *known* hazards; so far as we know, the Georgia Court of Appeals does not doubt a railroad's duty to remove *known* hazards. Nothing in the record shows any such doubt on the part of the Court of Appeals. Nothing in the petition points to the presence of any *known* hazard in this case. This case deals with a clinker, *unknown* in fact and *unknown* by legal implication.

Neither does this case present the question of "whether or

not the presence of a large clinker near the tracks in a railroad's yards may constitute negligence to an employee injured thereby," (petitioner's brief, page 3). This case presents the issue of the presence of a clinker under the circumstances alleged in this one petition. In this petition the offending clinker was not alleged to have been placed in the yard by the defendant and when the petition was construed against petitioner according to unvarying Georgia practice, it did not allege that the clinker had been placed in the yard except momentarily when the accident occurred.

b. *The Georgia Court of Appeals has restated in the decision herein only one substantive principle of law:* This principle is in complete accord with the many opinions of this Court interpreting and applying the Federal Employers' Liability Act. The one substantive principle of law laid down by the Georgia Court is this: "The mere presence of a large clinker in a railroad yard cannot be said to constitute an act of negligence" where "it is not shown how or for what length of time the clinker was in the yard . . . " (R. 8). This statement is predicated on the many times announced mandate of this Court that "The Act (Federal Employers' Liability Act) does not make the employer the insurer of the safety of his employees . . . " (R. 7).

Statement of the Case

Respondent accepts in the main the affirmative statement of facts embodied in the brief of the petitioner (petitioner's brief, pages 6, 7, and 8).

But the most remarkable feature of the petition in the case is not set forth in this adoption of the Georgia Court of Appeals' summary. For the petition at bar was more distinguished by what it failed to allege than what it actually charged. Presumably, counsel for petitioner, a skilled and experienced pleader, set forth in his petition the strongest possible case which

the facts in his client's matter would support. Then these facts from which this suit arose simply did not and could not, as pleaded and as they occurred, set forth a cause of action.

—1—

Petitioner's petition in paragraph 4 (R. 1) set out that the petitioner slipped and fell on a clinker lying beside the respondent's track. In paragraph 6 (R. 1 and 2) of the petition, petitioner alleged that coal, bottles, tie plates, trash and other debris were also in the yards of the respondent. But petitioner did not allege that he stepped on or was in any way injured by coal, bottles, tie plates, trash or "other debris." Thus the allusions to these other materials, such as coal, bottles, etc. are pure irrelevancies. The difficulty, of course, in the petitioner's case was that he could not fairly allege that the clinker he stepped on and the *one only clinker involved in this case* was negligently deposited or left in the yard with the respondent's actual or implied knowledge. Therefore, the petitioner attempted by allusion to connect extraneous matter, i. e., "debris," etc., to this *one clinker*. But not one word in the entire petition charges that this one clinker was in the yard through the respondent's negligence, nor was there any allegation in the petition that the petitioner was injured by anything except this one clinker. There was not the slightest allegation that this one clinker was part of a pile, but merely the statement in paragraph 4 (R. 1) that there was "a large clinker lying beside the track in the switch yards at Opelika, Alabama."

—2—

There was nothing in the petitioner's petition which alleged that this clinker was caused to be in the yard by the negligent operation of the respondent's locomotives.

—3—

The petition did not show that the respondent knew this one clinker was in the yard or that this clinker had remained there

for a sufficient length of time and under circumstances such that the respondent ought to have known of this clinker's presence in the yard. Petitioner's petition, in fact, contains not a single clause showing any negligence on the respondent's part in connection with this clinker. It did not appear that the clinker was deposited through the negligent operation of the locomotives of the respondent. In fact, the petition positively showed that these yards in which the clinker rested at the moment the petitioner stepped on it were used by another railroad, namely, the Central of Georgia Railway. (R. 1). The petition, of course, did not charge that the Western Railway of Alabama is in any way connected in responsibility to the operation of the trains of the Central of Georgia Railway.

Having failed to charge that the clinker *came to be* in the yard through the respondent's negligence, it was essential (if the petitioner would remain in court) for the petition to allege facts to show that in the operation of the yards the respondent had knowledge of the presence of the clinker and negligently did nothing to remove it, or that the respondent ought to have had knowledge of the clinker being in the yards and negligently failed to discover and remove it.

—4—

The petition alleged in paragraph 6 (R. 1 and 2) that the respondent had allowed "clinkers, coal, bottles, tie plates, trash and other debris to collect in said yards . . . ," but the petition nowhere alleged that the extraneous matter (which, by the way, had nothing to do whatever with the one clinker on which the petitioner stepped) had remained in the yards for one year, one month, one day, one hour, or one second. Construing, as the Court must, the petition against the pleader, it is clear that the petition charged merely that the alleged debris, etc., were in the respondent's yard for only the shortest imaginable length of time.

—5—

The petition did not anywhere allege that the clinker on which the petitioner stepped was part of that which had been "allowed . . . to collect." (R. 1 and 2).

—6—

In setting forth the grounds of negligence, the petitioner's petition charged in paragraph 17(b) (R. 3) that the respondent was negligent "in leaving coal, bottles, tie plates, sticks, trash and other debris along the side of tracks in its yards as aforesaid, well knowing that said yards in such condition were dangerous for use by brakemen working therein . . ." Nowhere in setting forth grounds of negligence did this petition charge that the respondent was negligent in leaving this *particular one clinker* on which the petitioner stepped in the yard where petitioner was injured. It will instantly occur to the Court that this paragraph 17(b) did not show that the respondent had or ought to have had any knowledge of the coal, bottles, etc., and debris, to say nothing of knowledge of this particular one clinker.

The most that this petition charged is that the yards contained certain debris (but nothing was shown to set forth the negligence of the respondent in connection with this fact) and that the respondent knew that generally yards with debris were dangerous for use by brakemen. The grave omission—the fatal fault in this petition—was the fact that it failed to show that the respondent had been guilty of negligence which contributed proximately to the injury of this petitioner.

Summary of Argument

The petitioner was injured in Alabama (R. 1). The respondent operates in Alabama. Petitioner was in the fortunate position of having at least three forums in which to bring his suit: he might have addressed his complaint to the Courts of

Alabama, or to the appropriate District Court of the United States, or to a Superior Court of the State of Georgia. Petitioner made his election and came to Fulton County, Georgia, and served an agent of the respondent who was located in Atlanta (R. 1). The Georgia Courts allow plaintiffs much latitude in pleading and in amending. Perhaps the Per Curiam ruling in *Bellamy* v. *Georgia Power Co.*, 70 Ga. App. 175, (27 S. E. (2nd) 783) will illustrate the enormous latitude which the petitioner enjoyed in drafting his pleadings. The Court there said:

> "Under our practice a defendant may deny as many of the plaintiff's allegations as he sees fit, and the denial of an allegation is not an affirmative declaration that the allegation is not true, but simply puts the plaintiff on notice that the burden is upon him to prove the allegation. We know of no rule of law or practice which penalizes the denial of allegations a defendant known are true. *The rule works both ways, and a plaintiff is not subject to penalty for alleging facts which he knows to be untrue at the time he makes them, where they are not made under oath.*" (Emphasis added).

But one rule of Georgia practice and procedure has been uniformly and invariably enforced: Pleadings are construed strictly against the pleader. For reasons which appeared sufficient to the petitioner, he chose the Georgia forum. To his petition the respondent entered a general demurrer. (R. 4). This demurrer was heard (R. 4). Prior to the ruling sustaining the general demurrer (R. 4) petitioner might have amended his petition to remain in court. *Section 81-1301* of the *Civil Code of Georgia of 1933* provides:

> "Amendments allowed when enough to amend by.—All parties, whether plaintiffs or defendants, in the superior or other courts, whether at law or in equity, may at any stage of the cause, as matter of right, amend their pleadings in all respects, whether in matter of form or of substance, provided there is enough in the pleadings to amend by."

This section has been very liberally construed. See *Ellison v. Georgia Railroad & Banking Co.*, 87 Ga. 691, (13 S. E. 809).

During the hearing on the general demurrer, petitioner was made aware of the legal objections to his petition. He did not choose to amend his petition to allege any one of the following:

1. That the clinker on which he stepped was dropped through the negligence of the respondent; and/or

2. That the presence of the clinker in the yard was known to the respondent; and/or

3. That the clinker had remained in the yard for a sufficient length of time to imply, as a matter of law, that the respondent had knowledge of the presence of the clinker in the yard.

Nor did the petitioner make any attempt to connect the vague and general allegation that there were "clinkers, bottles, tie plates, sticks, trash, and other debris along the side of the track . . . " (R. 3) to allegations about the offending clinker. Nor did the petitioner amend his petition so as to make the words "well knowing that said yards in such condition were dangerous for use by brakemen . . . " (R. 3) allege that the respondent knew that the yards were in such condition.

With a general demurrer interposed to the petition, with a hearing on the general demurrer, with ample opportunity to amend, with an unrestrained latitude of pleading, the petitioner elected to stand by his petition. Apparently this petition had stated his best possible case. Apparently the slightest strengthening of his allegations would have weakened the case before a jury. Apparently the petitioner had carried his allegations to the very limit of his evidence. Obviously, he was injured by one clinker which had momentarily fallen to lie *alone* in its *generc'* area.

The rules of practice and procedure in force in the Georgia Courts clearly apply to actions under the Federal Employers'

Liability Act. *Cent. Vt. R. Co.* v. *White*, 238 U. S. 507, (59 L. Ed. 1433). No error was committed by the Georgia Court of Appeals, therefore, in construing the petition against the pleader.

The petition, so construed, yielded a claim based on allegations that the petitioner was injured when he stepped on a single large clinker which had come momentarily to lie in a railroad yard without any fault of the defendant. Whatever the cause of the accident, whether it was due solely to the clinker's presence or solely to the negligence of the petitioner, or whether partially to the clinker's presence and partially to the petitioner's negligence, the following is incontrovertible: Under the decisions of this Court holding that an action under the Federal Employers' Liability Act must be based at least in part upon the negligence of the defendant, this petition stated, when properly construed, no cause of action. For assuming that the accident was solely and proximately related to the presence of the clinker, the petition did not relate in any way the presence of that clinker to any fault or negligence of the railroad.

Finally, no issue of special concern or importance is here presented to the Court. This Court has twenty times since the 1943 Term [see the concurring opinion of Mr. Justice Douglas in *Wilkerson* v. *McCarthy*, — U. S. —, (93 L. Ed. 403), (Advance Sheets)] reviewed Federal Employers' Liability cases on writs of certiorari. The essential elements of the law this Court has expounded under the Act are well-known. Perhaps these rules can be briefly summarized by pointing to their application in the very decision of the Georgia Court of Appeals of which petitioner is complaining:

> 1. "This is an action . . . controlled by the provisions of the Federal Employers' Liability Act, 45 U. S. C. A., Section 51, et seq. Although brought in a State Court, *all matters of substance are controlled by Federal law.*" (Then

the Georgia Court of Appeals cites not only *Seaboard Air Line Railway* v. *Horton*, 233 U. S. 492, (58 L. Ed. 1062), but several Georgia cases holding the same. (R. 7). (Emphasis added).

2. "The Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, and not the fact that injuries occur. And that negligence must be 'in whole *or in part*,' the cause of the injury." (Citing *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649, (91 L. Ed. 572). (R. 7). (Emphasis added).

3. When "there is no negligence on the part of the employer which caused or *contributed* to the injury, such employer is not liable therefor." (Citing *Atchison, Topeka & Sante Fe R. Co.* v. *Toops*, 281 U. S. (fol. 17) 351, (71 L. Ed. 896), and many Georgia cases.) (R. 7). (Emphasis added).

4. The Court took clearly into account the decisions of this Court abolishing "every vestige" of the common law doctrine of assumption of risk and making the doctrine of contributory negligence a matter for the jury in assessing the amount of damage. The Georgia Court of Appeals said: "The cases dealing with the abolition of the doctrine of assumption of risk in actions arising under the Federal Employers' Liability Act, and the effect of contributory negligence under the Act, *are necessarily predicated upon a showing of negligence on the part of the employer*, and are inapplicable to the case at bar." (R. 8). (Emphasis added).

The petition and decision in this case cannot conjure up any novel question. Indeed, presented here is a clear case where a state court has laid a petition (construed according to its unvarying practice), alongside the legal yardstick supplied by this Court, and has found the petition defective. This Court is

not even presented here with a case where it could draw different "allowable inferences" from evidence passed upon by a lower court. (See the concurring opinion of Mr. Justice Frankfurter in *Wilkerson* v. *McCarthy, supra.*) For while this Court may properly reach a different conclusion from that of a lower court as to whether particular evidence sets out a case of negligence, the construction of pleadings in a state court is a matter for the court of the state. And can it be seriously contended that a petition sets out a cause of action under any decision of this Court when the petition merely shows:

a. A large clinker in a railroad yard; and

b. That it was there through no fault of the railroad, and

c. That the railroad did not know either actually or impliedly that the clinker was there.

We respectfully submit, therefore, that this is certainly no case for the granting of the writ of certiorari.

Argument

1. *The Georgia Court of Appeals gave the petition in this case a normal construction in accordance with the unvarying rule of practice in this State to construe pleadings against the pleader.*

Perhaps the petition in this case would under rules of practice prevailing, for example, in a Federal District Court, have been sufficient to state a cause of action. Some rules of pleading in the Federal Courts are considerably more liberal than those in Georgia, (see Rule 8 Federal Rules of Court Procedure). It may well be that the Federal Rules are very preferable, but Georgia has not changed the common law rule that pleadings (especially on general demurrer) are construed against the pleader, (See 49 *Corpus Juris*, p. 105). The Georgia rule does not vary depending on whether a case is brought under a Federal

statute, a State statute or a common law right. The rule is the same for all pleaders—plaintiffs and defendants—and it applies in all cases.

The petition at bar was not subjected to a more vigorous construction because it was brought under the Federal Employers' Liability Act. A very cursory survey of Georgia cases will show that the rule of construing pleadings strictly and against the pleader has been very rigidly enforced. In *Krueger* v. *MacDougald*, 148 Ga. 429, (96 S. E. 867), Atkinson, J. declared that the "elementary rule of construction, as applied to a pleading, that it is to be construed most strongly against the pleader; and that if an inference unfavorable to the party claiming a right under such a pleading may be fairly drawn from the facts stated therein, such inference will prevail in determining the rights of the parties . . . is so universally recognized that it is unnecessary to cite authority for it or to state the reasons upon which it is based."

This principle of construction means in Georgia, amongst other things, "that where two matters are pleaded in the disjunctive, one of which is good and the other not, the petition is to be treated as pleading no more than the latter." *Doyal* v. *Russell*, 183 Ga. 518 (189 S. E. 32).

It is especially important to notice that in setting forth the specific grounds of negligence charged against respondent, the petitioner did not allege any negligence with respect to the presence of the particular offending clinker in the yards. (Par. 17 of petition, R. 3). In Georgia, it has been repeatedly held that a plaintiff cannot recover on other acts of the defendant which, while even set forth in the petition, are not therein alleged as negligence. See *Charleston and Western Carolina Rwy. Co.* v. *Patton*, 22 Ga. App. 554, (96 S. E. 504).

The construction given the petition at bar is supported by a long line of precedents arising from common law cases. The

gist of these cases is that the presence of a dangerous object on the premises of a store, a hotel, or a passenger platform, by which an invitee is injured, does not of itself make out a case of negligence. The petition must, if it is to resist a general demurrer, allege that the object was there with the knowledge of the defendant or that it had remained there for a sufficient length of time so that he ought to have known of its presence.

In *Cook* v. *Kroger Baking & Grocery Co.*, 65 Ga. App. 141, (15 S. E. (2nd) 531), the plaintiff stepped on a slick place allegedly caused by a carrot top which had been mashed under foot in defendant's store. The petition alleged, "The defendant invited her into the store, and it was its duty to see that the floor was kept clean through inspection and, in failing so to do and in *allowing* it to become slippery, the defendant failed to exercise ordinary care." (Emphasis added).

To these allegations the defendant interposed a general demurrer. The Court of Appeals upheld the action of the lower court in sustaining this general demurrer, and in its decision said:

> "The innocence of the person injured does not necessarily establish the negligence of the defendant. The defendant cannot be liable unless he owed to the person injured a duty which he neglected. The defendant is not an insurer. Here no active negligence, no structural defects, and no actual knowledge of the defendant that the carrot top was on the floor of the defendant's grocery store is alleged."

In *Castleberry* v. *Fox*, 29 Ga. App. 35 (113 S. E. 110), the court reviewed a non-suit granted in the lower court. In such a review, all the inferences were in favor of the plaintiff. Yet the court held that where the guest of a hotel slipped and was injured on a banana peel on the stairway, negligence is not shown merely by evidence that the peel was "practically the color of the floor—a dark color."

To the same effect see, *Atlanta and West Point R. Co.* v. *Hyde*, 45 Ga. App. 548, (165 S. E. 466); *Brown* v. *S. H. Kress Co.*, 66 Ga. App. 242, (17 S. E. (2nd) 758), and *Ellis* v. *Southern Grocery Stores, Inc.*, 46 Ga. App. 254, (167 S. E. 324).

2. *The Federal Employers' Liability Act having conferred on the State Courts a jurisdiction concurrent with that of the Federal Courts in actions under the statute, and having made no regulation of the practice in those actions, the practice in an action under Title 45 U. S. C. A., Sects 51 to 60, is regulated by the law of the forum.*

The above principle of law is well established and frequently asserted. See, *Cen. Vermont R. Co.* v. *White*, 238 U. S. 507, (59 L. Ed. 1433); *C. C. O. R. Co.* v. *DeAtley*, 241 U. S. 310, (60 L. Ed. 1016); *Henry Brinkmeier* v. *Missouri Pac. R. Co.*, 224 U. S. 268, (56 L. Ed. 758). The law of the forum applies to matters of the admissibility of evidence and procedure, *DeLong* v. *Maine Cen. R. Co.*, (Supreme Judicial Court of Maine) 6 A. 2nd 431.

The law of the forum governs, for example, the question whether a suit is still pending in the state courts. And though the decision that a suit was not pending ended a cause of action which had on a previous trial resulted in a $30,000 verdict, no substantial right under the Federal Employers' Liability Act was affected. See *Victor Herb* v. *Norman B. Pitcairn*, 324 U. S. 117, (89 L. Ed. 789).

In *Tipton* v. *A. T. & S. Fe R. Co.*, 298 U. S. 141, (80 L. Ed. 1091), this Court, speaking of the Safety Appliance Act, 45 U. S. C. A. Secs. 11-16, said that it modified "the enforcement, by civil action, of the employee's common law right in only one aspect, namely, by withdrawing the defense of assumption of risk. They do not touch the common or statute law of a state governing venue, limitations, contributory negligence, or recovery for death by wrongful act."

Verdicts in state courts may be rendered in Federal Employers' Liability Act cases by less than a unanimous jury, though the Seventh Amendment to the Federal Constitution guarantees a trial in the Federal Courts by a jury acting according to the course of the common law, that is, by a unanimous verdict. *Minn. & St. L. R. Co.* v. *Bombolis*, 241 U. S. 211, (60 L. Ed. 961). There the Chief Justice pointed out that in enforcing a Federally created right, the state court was not "to be treated as a Federal Court, deriving its authority not from the state creating it, but from the United States."

In *Mondou* v. *N. Y., N. H. & H. R. Co.*, 223 U. S. 1, (56 L. Ed. 327), this Court, while expressly holding that a state court was bound to take jurisdiction of an action brought under the Federal Employers' Liability Act, said that under the Act there was "involved any attempt by Congress to enlarge or regulate the jurisdiction of the state courts, or to control or affect their modes of procedure . . . "

In *Cen. of Ga. R. Co.* v. *Jones*, 152 Ga. 92 (108 S. E. 618), 28 Ga. App. (110 S. E. 914), 258, certiorari denied, 260 U. S. 729, (67 L. Ed. 485), the Supreme Court of Georgia, speaking through Justice George (as he then was) held that where an injured employee "died pending an action by him, in which his petition failed to show whether his action was based on the Federal Employers' Liability Act or the state statute, and his administratrix, after being made a party to the suit filed an amendment alleging a right of action under the Federal Act, it was held, that, although Sec. 9 of the Federal Employers' Liability Act (36 Stat. at L. 291, chap. 143; Comp. Stat. Sec. 8665, 8 Fed. Stat. Anno. 2d ed. p. 1378) provided for the survival of an injured employee's right of action to his personal representative, a state statute prohibiting the allowance of an amendment setting up a 'new and distinct cause of action . . . unless expressly provided for by law,' was "nevertheless operative to defeat the allowance of such an amendment."

Justice George said:

> "It is also agreed that when an act of Congress in regard to a subject within the domain of Congress creates a right upon condition, compliance with the condition is essential, and that the State, under the guise of procedure, can not take away or affect a substantive right created by Congress. The application of State rules of procedure and practice, under the peculiar facts of this case, will result in some inconvenience. Nevertheless we are of the opinion that no substantive right of defense under the Federal act will be affected by a proper application of the rules of procedure prevailing in this State. We are clear, however, that Congress not only did not attempt to regulate matters of procedure in the State court, but that it had no power to do so. *Small* v. *Slocumb*, 112 Ga. 279 (37 S. E. 481, 53 L. R. A. 130, 81 Am. S. R. 50); see also *Ga. So. etc. R. Co.* v. *Smiley*, 151 Ga. 795 (108 S. E. 273). When Congress creates a right and confers jurisdiction on the Courts of the State to enforce the right, it adopts the prevailing rules of procedure in the State. As was held in *Mondou* v. *New York etc. R. Co.*, *supra*, the 'systems of jurisprudence of the State and of the United States, together form one system which constitutes the law of the land for the State.'"

The rule is further refined at 35 Am. Juris. p. 875:

> "Accordingly, the state practice is held to be determinative of questions concerning the sufficiency of a pleading to state a cause of action . . ."

Substantially the same rule has been stated at 25 *Corpus Juris* 944:

> "The decisions of state courts as to questions of state practice or procedure or the sufficiency, construction, etc., of pleadings are not reviewable by the supreme court, even though the action is brought under a federal statute."

This rule often works in favor of plaintiffs. In *Louisville & Nashville R. Co.* v. *Stewart's Admx.* (Court of Appeals of Ken-

tucky), 161 S. W. 557, the petitioner brought a complaint which charged only in general terms that decedent's death occurred through the negligence of the agents and employees of the railroad. The negligence was not spelled out in detail. A demurrer was interposed. The Court in passing on the question raised thereby said:

> "It is urged by appellant that the demurrer to the petition should have been sustained because the plaintiff was proceeding under a federal statute and should have been required to set up with particularity the acts of negligence complained of as he would have been required to do in the federal court; *but the Act of Congress does not undertake to prescribe the mode of procedure where the action is pending in the state courts, except in certain particulars not here involved. So that, the general allegation of negligence being held sufficient in this state prior to enactment of the Employers' Liability Act, such a plea will be held good even when proceeding under that act.*" (Emphasis added).

In *Dewing* v. *N. Y. Cen. R. Co.* (Supreme Judicial Court of Mass.), 183 N. E. 754, the Court held:

> "The plaintiff having waived the second count of his declaration, which was drawn under the Federal Employers' Liability Act (U. S. C., title 45, Sec. 51, et seq. (45 USCA Secs. 51-59), obtained a verdict from the jury upon a first count, which alleged merely that 'he was greatly injured by reason of the negligence of the defendant, and has suffered great pain and body anguish (sic) of mind.' This vague allegation, under our practice which in this respect controls, cannot be construed as stating a case under the Federal Employers' Liability Act, but must be deemed a count upon the common law."

It is appreciated by respondent's counsel that the state court may not under the rule we are presenting here diminish or destroy any federal right or defense. It would clearly not be permissible for a state court to apply more rigid procedural rules against plaintiffs suing under a Federal right than in cases

brought under some state statute or the common law. This Court has apparently regarded this test of good faith as a touchstone. See *Vandalia R. Co.* v. *Ind. Ex rel. South Bend*, 207 U. S. 359, (52 L. Ed. 246); *Kentucky Union Company* v. *Kentucky*, 219 U. S. 140, (55 L. Ed. 137); *Lee* v. *Cen. of Ga. R. Co. et al.*, 252 U. S. 109, (64 L. Ed. 482), where Mr. Justice Brandeis dealt with a Georgia decision which refused to permit joinder of a railroad and an engineer as defendants in an action under the Federal Employers' Liability Act. He declared this a matter of "pleading and practice"; and that the Georgia courts had not discriminated against the plaintiff appears from the fact that the Supreme Court of Georgia had applied the same rule in other cases under the State Employers' Liability Act.

Mr. Justice Holmes dealt with a similar proposition in *Nevada, California, Oregon Ry. Co. v. Burrus*, 244 U. S. 103, (61 L. Ed. 1019):

> "Upon the question whether a claim of immunity under a statute of the United States has been asserted in the proper manner under the state system of pleading and practice 'the decision of the state court is binding upon this court, when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion, for the purpose of defeating the claim of Federal right.'"

It is not asserted that in this case the Georgia Court has applied a different rule of construction than is uniformly applied to actions at common law and under state statutes.

Indeed, counsel for petitioner (pp. 9-11 petitioner's brief) generally applauds the record of the Georgia Appellate Courts in dealing with Federal Employers' Liability Act cases. Counsel, in fact, suggests that the decision in this case rests upon the courts' *misinterpretation* of the case of *Lee* v. *Cen. R. Co.*, 88 Ga. 231, (12 S. E. 307). (Page 9 petitioner's brief). However, it might be recalled that the opinion in this case *does not cite* and is not predicated upon the Lee case.

Nor would this case be controlled by *Southern Ry. Co.* v. *Puckett*, 16 Ga. App. 551, (86 S. E. 809), (petitioner's brief, page 10), where the court was dealing with allegations of a "cinder pile."

Nor is the decision in this case in conflict with *Cen. of Ga. Ry. Co.* v. *Goens*, 30 Ga. App. 770, (119 S. E. 669), (petitioner's brief p. 11), where the proximate cause of the injury was arch brick and cinders placed within 2½ feet of the track by the negligence of defendant's agents, (petitioner's brief, p. 11). Nor is the decision herein in conflict with *Gay* v. *Osteen*, 56 Ga. App. 224, (192 S. E. 539), (petitioner's brief, page 11), where it was alleged that a "car inspector employed by the defendant had . . . removed a defective brake shoe . . . and instead of taking it out of the yards . . . negligently threw it down between the tracks."

We earnestly assert that these Georgia cases are not applicable to any argument here. The Georgia Court of Appeals decision is not predicated upon them. The Georgia Court's opinion (R. 5-8) is based clearly upon Federal cases or state cases which hold that the basis of action under the Federal Employers' Liability Act is *some* negligence of the employer. But the pleadings at bar alleged no negligence against the defendant with respect to the object which it is alleged was the proximate cause of petitioner's injury.

3. *The mere allegation that a large clinker has come to lie momentarily in a railroad yard without any allegations attributing the clinker's presence to the defendant does not set out a cause of action under the Federal Employers' Liability Act.*

Negligence remains the basis of action under the Federal Employers' Liability Act: *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, (88 L. Ed. 239). As long as negligence is the necessary ingredient, the defendant must have been guilty of some fault before there can be a recovery. The Federal Employers' Liability Act

did not change that rudiment of common law liability which Mr. Justice Holmes set out in the *Common Law*, (38th Printing, Little Brown and Company, 1945), pp. 94 and 95:

> "The general principle of our law is that loss from accident must lie where it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune. But relatively to a given human being anything is accident which he could not fairly have been expected to contemplate as possible, and therefore to avoid. In the language of the late Chief Justice Nelson of New York: 'No case or principle can be found, or if found can be maintained, subjecting an individual to liability for an act done without fault on his part . . . All the cases concede that an injury arising from an inevitable accident, or, which in law or reason is the same thing, from an act that ordinary human care and foresight are unable to guard against, is but the misfortune of the sufferer, and lays no foundation for legal responsibility.'"

A considerable number of cases have arisen under the Federal Employers' Liability Act in which plaintiffs have stepped and have been injured on clinkers, stones, bottles and sticks alongside railroad tracks. These cases show that before liability of the railroad is established it must appear that the debris was there by the defendant's negligence or that it remained there with the defendant's actual or implied knowledge. In a very recent case, *Waller* v. *Northern Pac. Terminal Co. of Oregon*, 166 Pac. 2d 488, (certiorari denied, -- U. S. —, (67 S. Ct. 45)), an employee allegedly slipped and fell on a stick in the terminal yards. There was a verdict and judgment for the plaintiff, which the appellate court reversed because:

> "Assuming that the plaintiff slipped by stepping on a stick, there is not a scintilla of evidence to indicate how long the stick had been there. From all that appears from the evidence, it may have fallen from the train which the plaintiff was boarding."

It is of interest to note that in the Waller case there was evidence that debris did collect each day and that the yards were cleaned once daily. If the plaintiff were injured by debris collected within the course of one day, apparently the accident happened without the fault of the defendant. In the Brown case herein, there is no allegation that the clinker (or for that matter the "debris" which is wholly irrelevant, as we have shown) was in the yard for one second, one minute, one hour or one day. The plaintiff's untimed allegations construed against him certainly do not carry the inference that what injured him had been in the yard for as long as one day. We again stress that the plaintiff herein had ample time before his petition was dismissed to meet this issue. He had not fallen on a technicality, but upon the weakness of his case.

Cases cited in petitioner's brief predicate liability *upon fault*. For example, in *Henwood* v. *Cheney*, 156 F. 2d 392 (8th Cir. 1946), (petitioner's brief, p. 15), the negligence charged was in permitting oil on and near the tracks where the plaintiff worked for a period of *several years*.

In *Cin., N. O. & T. Ry. Co.* v. *Davis*, 293 F. 481, (6th C. C. A.) (petitioner's brief, p. 12), the defendant was charged with "throwing and distributing" the crossties in the place the petitioner worked. Herein, no charge is made that *the defendant* placed the cinder in the petitioner's place of work.

In *B. & O. R. Co.* v. *Fletcher*, 300 F. 318 (6th Cir. 1924), (petitioner's brief, p. 13), the hoop on which plaintiff stepped was rusty and there was evidence on which the jury could have found the defendant had actual or implied knowledge of the presence of the hoop in the yard.

In *C. B. & Q. R. Co.* v. *Kelly*, 74 Fed. 2d 809 (8th Cir. 1934) (petitioner's brief, p. 14), the negligence charged was the presence of weeds growing over the top of rails. Of course, weeds

do not grow momentarily. The issue of knowledge was, therefore, in the case.

While we make no attempt to read more than is intended into the cases in which this Court has recently denied certiorari, it would seem permissible to infer the following without fear of contradiction:

1. Liability under the Act is predicated upon fault.

2. Not every petition and not every compilation of evidence constitutes a jury question.

The Georgia courts, as petitioner's counsel demonstrates (petitioner's brief, pp. 10 and 11), are not given to withholding doubtful cases from a jury.

The most cursory survey of the recent Federal Employers' Liability Act cases in which this Court had denied certiorari will show that:

Where a place of working is rendered unsafe without the employer's knowledge, even a verdict based on injury in that place cannot stand. *Lasagna* v. *McCarthy, et al*, 177 P. 2d 734, certiorari denied 332 U. S. 829, (92 L. Ed. 403).

Where an accident occurs *solely* through the negligence of the plaintiff, a verdict in his favor must be upset. *Wolfe* v. *Henwood*, 162 F. 2d 998, certiorari denied 332 U. S. 773, (92 L. Ed. 357).

Even where there is some possibility that the plaintiff intestate was killed through the fault of the railroad, yet where because of lack of knowledge of the true facts surrounding the injury, no fault is shown, there is no liability against the defendant. Apparently, it is up to the plaintiff to make the case of negligence against the defendant. *Cowdrick* v. *Pa. R. Co.*, 39 A. 2d 98, certiorari denied 323 U. S. 799, (89 L. Ed. 637).

Conclusion

The Georgia Court of Appeals has impinged on none of the aintiff's Federal rights. This decision has established no ecedent which will hamper or diminish the opportunities of ture petitioners under the Act. The case presents no novel estion. It is highly unlikely that a petitioner will refuse to nend his petition to set out facts showing negligence, if such cts do exist. In any event, we do not believe that this Court ll wish to do what the petitioner in effect urges—that is, ange the rule of strictly construing pleadings in the Georgia ourts in Federal Employers' Liability Act cases. It might be eful to say, in conclusion, that if this petitioner had brought to e Court a meritorious case and had plead it unambiguously, en the rule of strict construction would have possibly re-ounded to his advantage in a consideration of defendant's an-ver. The rule itself is impartial; it does not work for de-ndant's alone. But right or wrong, the rule is the law of the rum of this suit; it is universally applied and petitioner was t surprised by it. We, therefore, respectfully pray that this plication for the writ of certiorari be denied.

Respectfully submitted,

ARTHUR HEYMAN,
HUGH HOWELL, SR.,
HERMAN HEYMAN,
MORRIS B. ABRAM,
Attorneys for Respondent

EYMAN, HOWELL & HEYMAN,
Connally Building,
Atlanta, Georgia

EINER, CRUM & WEIL,
Montgomery, Ala.

SUPREME COURT, U.S.
FILED
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 43

RICHARD J. BROWN,

Petitioner,

vs.

WESTERN RAILWAY OF ALABAMA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

PETITION FOR CERTIORARI FILED MARCH 18, 1949

CERTIORARI GRANTED MAY 2, 1949

BRIEF ON BEHALF OF RESPONDENTS

Arthur Hertzog,
Henry Bowers, Jr.,
Randall Hertzog,
Morris B. Abram,
Attorneys for Respondent.

Hertzog, Bowers & Hertzog,
514 Connally Building,
Atlanta, Georgia.
Stanley Camp & Weil,
Montgomery, Alabama.

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STATUTES CITED

Federal Employer's Liability Act, 45 U. S. C. A., Secs. 51, et seq.
Civil Code of Georgia, Secs. 81-1301
U. S. C. A. 28, Sec. 1257 (3); (old title 28—Secs. 344-724)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 43

RICHARD J. BROWN,

Petitioner,

vs.

WESTERN RAILWAY OF ALABAMA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

PETITION FOR CERTIORARI FILED MARCH 18, 1949
CERTIORARI GRANTED MAY 2, 1949

BRIEF ON BEHALF OF RESPONDENTS

Questions Presented

The Respondent herein has filed a brief resisting the application for the writ of certiorari. Facts and authority there briefed will not be fully stated or argued herein. Respondent, therefore, will limit itself to the following points:

1. Whether the well established state rules of procedure shall continue to apply in actions brought in state courts based on the provisions of the Federal Employer's Liability Act (45 U. S. C. A. Sec. 51, et seq.)?

2. Whether the following is a correct principle of substantive law under the decisions of this Court, applying the Federal Employer's Liability Act?

> "The mere presence of a large clinker in a railroad yard cannot be said to constitute an act of negligence,"

where, "it is not shown how or for what length of time the clinker was in the yard," and where it is not charged that the defendant or its agents placed the clinker there. (R. 8.)

3. Whether the Court has improvidently granted this writ of certiorari?

Statement of the Case

We have stated the case with particularity on pages 3 through 6 of Respondent's Brief opposing the granting of the writ. It will suffice to repeat that petitioner's declaration in this case did not state that the offending clinker on which he allegedly fell had come to lie in the joint yards of the respondent and another company through the negligence of respondent nor did the declaration state that the respondent knew the clinker was in the yard nor that it had remained there for any length of time whatever so as to show the respondent had constructive knowledge of the clinker's presence. The petition also did not allege any grounds of Respondent's negligence (absolutely required under Georgia practice) with respect to the particular clinker on which petitioner allegedly fell.

Georgia practice, as shown in Respondent's prior brief in this cause, is to construe pleadings strictly against the pleader; to require the pleader to plead the *factual* allegations on which he lays his claims rather than to stand on conclusions, and to allege the ground of the particular negligence on which he expects to recover. These requirements are particularly stressed when a petition is attacked by demurrer.

SUMMARY OF ARGUMENT

Application of State Rules of Procedure

A Distinction to be Noted

This Court has, though not unanimously, come to accept an

inference theory in Federal Employer's Liability Act cases under which jury verdicts based on inferences and speculation from evidence on trial have been allowed to stand. See *Lavender v. Kurn*, 327 U. S. 645, 90 L. Ed. 916.

We do not challenge this doctrine in this case; for this case does not in any way involve this doctrine.

It is one thing to *permit* a jury of reasonable and fair-minded men to draw inferences from *facts as established by the evidence* but quite another *to require* that state Court Judges *as a matter of law* must draw inferences from facts not alleged in a petition.

Yet, this is the novel principle by which this Court is being asked to sustain the Petitioner in this case.

The position of the Respondent is simply this: Given under the law the choice of three forums (State Courts of Alabama and Georgia and the Federal District Court), the Petitioner chose to sue in Georgia. The Georgia rules of practice and procedure apply to suits brought in State Courts under the Federal Employer's Liability Act. These rules are flexible, permit easy amendment, and allow petitioners to plead alternative and inconsistent theories and place no legal or moral onus upon pleaders for untrue allegations (unless verified, which these were not).

Favored by these liberal reforms of the basic common law rules of pleading, the petitioner complains of a firmly established Georgia rule of practice and pleading: Pleadings are construed strictly against the pleader. This applies to petitions but equally to answers. The rule is time honored and obviously well known to Petitioner's able Georgia Counsel.

The principle issue now in this case is whether Federal Rules of practice and procedure are to be applied in state court actions under the Federal Employer's Liability Act.

Another Distinction to be Noted

Respondent recognizes that no State Court may deprive Peti-

tioner of a substantive Federal right under the Federal Employer's Liability Act. But the Courts of Georgia have impinged upon none of this Petitioner's substantive rights. The decision complained of in the Georgia Court of Appeals does not restrict the liberal interpretation of the Federal Employer's Liability Act; it does not enlarge the requirements of proof in actions under the Act; it is merely one of hundreds of decisions applying a well known Georgia and common law rule of practice.

Such rules of practice as that Petitioner complains of do not prevent or hinder petitioners in the slightest from recovering in every case where they have a meritorious claim and are willing to plead it—even alternately and inconsistently.

Surely it is not too much to insist that a claimant under a Tort Act based on the theory of liability in negligence must set out in his pleadings allegations, which, if proved, entitle a recovery. And the State practice is surely fair which permits petitioner to say whatever he pleases, however he wishes to, and in as many alternate ways as he desires. Rules of practice are, of course, required to present the facts and to frame the issues for trial. But all rules, of necessity, interpose requirements between the petitioner and his recovery. But these requirements do not *ipso facto* deprive plaintiffs of substantive rights. Not unless they enlarge the requirements of proving a prima facie case or in other ways restrict the effect of alleged facts to obtain a legally justified recovery. But the Georgia rules of pleading and practice have not whittled away a single right of this petitioner. He has become impaled not upon the Georgia rules of pleading but upon his failure to comply with them. Under the Federal Employer's Liability Act, a cause of action cannot be inferred from an accident, nor does a petitioner have a right to have a jury infer from his petition. The question of what inferences may be drawn by a jury arises in those cases where admissible evidence has been presented under allegations which present a cause of action.

The Rule of Law in the Court of Appeals Decision

As long as negligence remains the basis of liability under the Federal Employer's Liability Act, it is submitted that no legal fault can be found with the substantive decision of the Court of Appeals in this cause. The following is the rule of that decision:

> "The mere presence of a large clinker in a railroad yard cannot be said to constitute an act of negligence" where "it is not shown how or for what length of time the clinker was in the yard." (R. 8.)

The Granting of the Writ

Unless this Court has in mind the reversal of the hitherto well established rule that practice under the Federal Employer's Liability Act is regulated by the law of the forum, there is presented in this writ no matter of special concern or importance.

The Georgia Court of Appeals did not announce in its decision a single new rule of Georgia practice nor did it vary one whit from any announced decision of this Court involving the Federal Employer's Liability Act.

The Georgia Court explicitly stated:

> "This is an action . . . controlled by the provisions of the Federal Employer's Liability Act, 45 U. S. C. A., Section 51, et seq. Although brought in a State Court, *all matters of substance are controlled by Federal Law.*" (R. 7.) (Emphasis added.)

The Court very carefully took into account the decisions of this Court abolishing "every vestige" of the common law doctrine of assumption of risk and making the question of contributory negligence a jury consideration in assessing damages. (R. 8.)

For a more elaborate discussion of the questions involved in

this appeal, please see pages 9 through 11 of Respondent's brief heretofore filed in this cause.

It cannot be contended that a petition sets out a cause of action under any decision of this Court when the petition merely shows:

a. A large clinker in a railroad yard; and

b. That it was there through no act of the railroad nor any of its agents; and

c. That the railroad did not know, either actually or impliedly, that the clinker was there.

These are precisely the facts which the Georgia Court found alleged in this petition, stripping away all the legal conclusions which yielded to the demurrers.

We respectfully submit that unless the Court has in mind to require that the State Courts use Federal rules of practice in Federal Employer's Liability cases, that this writ should now be dismissed as having been improvidently granted.

ARGUMENT

Georgia Rules of Pleading

We do not argue the merits of the Georgia Rules of Pleading and Practice. It may well be that the Federal Rules are preferable. But preferable or not, the Georgia Courts have, under the mandates of this Court, applied their own rules of practice in cases arising under the Federal Employer's Liability Act. See, *Cen. Vermont R. Co.* v. *White*, 238 U. S. 507, 59 L. Ed. 1433.

The Georgia Rules of Pleading allow amendment "at any stage of the cause, as a matter of right" and "in all respects whether in matters of form or substance." See Georgia Civil Code of 1933, Section 81-1301. This is a liberal rule viewed from the common law and it is seen to be especially so when

one considers the uncabined latitude with which plaintiffs can allege their facts:

> ". . . and a plaintiff is not subject to penalty for alleging facts which he knows to be untrue at the time he makes them, where they are not made under oath."
>
> *Bellamy* v. *Georgia Power Co.*,
> 70 Ga. App. 175, 27 S. E. 2d 783.

In Georgia it is permissible for a petition to contain two or more counts, each of which refers to the same cause of action but differing from each other in substantial particulars as to the details of the transaction. See, *Gainesville, etc. Ry. Co.* v. *Austin*, 127 Ga. 120, 56 S. E. 254.

In fact, it is permissible to embrace in one petition in different counts as many causes of action as the plaintiff sees proper, provided they are all of a similar nature. *Cooper* v. *Portmer Brewing Co.*, 112 Ga. 894, 38 S. E. 91.

And not only is it permissible, but it is general practice to allege in one petition in separate counts, the breach of obligation in different ways, when by doing so the plaintiff's chances of recovery would be strengthened. *Williams* v. *Smith*, 71 Ga. App., 632, 637; 31 S. E. (2) 873.

Under permissible and usual Georgia Practice, a plaintiff with any case at all can get it heard by merely pleading the facts or the supposed facts. Substance is never under these liberal rules sacrificed to form; though at times truth is sometimes sacrificed for imagination. The only restraint upon the plaintiff is the ever present consideration that some day he must face a jury with any supposititious allegations in the petition.

On the other hand, having given the plaintiff the freedom to plead as he will, the Courts construe these pleadings strictly against him. A petition, especially on demurrer, must satisfy the following requirements:

(a) The petition must allege facts with a reasonable definiteness and certainty. *Cedartown Cotton Co.* v. *Miles*, 2 *Ga. App.* 79; 58 S. E. 289. Applying this principle to the question of implied knowledge of unsafe working conditions, the Georgia Courts have held that the allegation "Said fact should have been known to the defendant . . ." as a mere conclusion and does not satisfy the requirement of reasonable certainty. *Id.*

(b) Pleading is not to be ambiguous. The penalty for ambiguous pleading is that it is construed strictly against the pleader. *Hardin v. Baynes*, 198 Ga. 683; 32 S. E. (2) 384. Ambiguity signifies, amongst other things, "Of doubtful or uncertain nature; wanting clearness or definiteness; difficulty to comprehend or distinguish; of doubtful purport; open to various interpretations." *Mac Creary* v. *Action*, 29 Ga. App. 162, 165; 114 S. E. 230. The Georgia Supreme Court has consistently pronounced the common law rule that when a pleading is susceptible of two meanings that shall be taken which is most unfavorable to the pleader. See *Renfroe* v. *Colquitt*, 74 Ga. 618.

(c) In negligence suits, it is not sufficient to allege the negligence in general terms. The plaintiff may recover only on the specific grounds of negligence charged. In the case at Bar, it will be recalled that the plaintiff made no allegation of negligence regarding the clinker on which he allegedly stumbled.

(d) It is a fundamental rule of practice in Georgia that facts and not legal conclusions must be alleged. *Butler* v. *City of Dublin*, 191 Ga. 551, 555; 13 S. E. (2) 362.

The rules of construction of pleading in effect in Georgia are, of course, basically the common law rules. (See 49 *Corpus Juris*, p. 105.) That part of the doctrine applicable to this case is well stated in 49 *Corpus Juris*, p. 120:

> "Where the pleading is silent regarding a material fact, the presumptions are against the pleader and no intendment can be made in his favor. Thus a material fact, if not alleged, is presumed not to exist."

Federal Recognition of the Georgia Rule of Construction

The Georgia rule of strict construction of pleadings against the pleader has been noted and applied in Federal Courts. See *Old Colony Trust Co.* v. *Atlanta B. & A. R. Co.*, 264 Fed. 355.

In *Driskell* v. *Powell*, 67 Fed. (2), 484, Circuit Judge Sibley on an appeal from a decision rendered in a Georgia Federal District Court stated:

> "Pleadings at law are to be construed on demurrer strictly against the pleader. It is to be presumed that the pleader has put his case in the most favorable light possible, and omissions of facts important to be alleged is taken to mean that they do not exist." (Citing numerous Georgia cases.)

The Georgia rule of strict construction invoked in the case now before this Bar is universally applied, and its application to the petitioner's complaint was merely standard procedure.

Question Now Before the Court

The Georgia Rules of Practice, requiring the construction of pleadings strictly against the pleader are well established. Right or wrong, these Georgia Rules are enforced in Georgia Courts in all cases in those forums. The question is whether these rules of practice are to apply to cases under the Federal Employer's Liability Act?

The Law of the Forum in Federal Employer's Liability Act Cases

Hitherto, it has been repeatedly said that the Federal Employer's Liability Act having conferred on the State Courts a jurisdiction concurrent with that of the Federal Courts in actions under the statute, and having made no regulation of practice in those actions, the practice in an action under *Title* 45 *U. S. C. A.*, Sects. 51 to 60, is regulated by the law of the

forum. See *Cen. Vt. R. Co.* v. *White*, 238 U. S. 507; 59 *L. Ed.* 1433; *C. & O. R. Co.* v. *DeAtley*, 241 U. S. 310; 60 *L. Ed.* 1016; and *Henry Brinkmeier* v. *Mo. Pac. R. Co.*, 224 U. S. 268; 56 *L. Ed.* 758.

This principle does not seem to have been hitherto challenged and the application of the doctrine is to be seen from the authorities and instances of its application outlined in pages 14 through 19 of Respondent's previous brief.

Absence of Federal Question

Petitioner has invoked the jurisdiction of this Court under *Title* 28 *U. S. C.*, Section 1257 (3).

The section invoked was derived from *old Title* 28 *U. S. C. A.*, Section 344. The decisions under that section clearly show that claims empowering the issuance of the writ of certiorari to a State Court "must be asserted at the proper time and in the proper manner by pleading, motion, or other appropriate action under the state system of pleading and practice, and upon the question whether such a claim has been so asserted, the decisions of the State Court is binding upon the Supreme Court when it is clear that such decision is not rendered in a spirit of evasion, for the purpose of defeating the claim of Federal Right." 54 *American Jurisprudence*, Section 243, p. 881. See also *Hartford Life Ins. Co.* v. *Johnson*, 249 U. S. 490; 63 *L. Ed.* 722; *A. C. L. R. R. Co.* v. *Mims*, 242 U. S. 532; 61 *L. Ed.* 476.

No claim is or could be made that the Georgia Court of Appeals in this case applied an extraordinary rule of construction or in any manner attempted to discriminate against this petitioner or his Federal rights.

No New Question

The Court has heretofore considered whether the state rules

of pleading construction constitute Federal Questions when there is no issue of discrimination nor intent to evade a Federal right.

The Court has long held that the construction of pleadings is in the absence of such an issue, a local question. This was the ruling of the Court in the case of *Isaac N. E. Allen* v. *Alleghany Co.*, 196 U. S. 458; 49 *L. Ed.* 551; there the Court ruled that a decision of the highest state court of New Jersey that a plea when construed most strongly against the pleader did not disclose a defense to a suit on a note, but involved a purely local question governed by the law of the forum. Of the plea the Court said:

> "Construing the third plea most strongly against the pleader, the conclusion was that it disclosed no defense in the action. This was purely a local question, and is not assignable as error here." (196 *U. S. at* 465.)

In a recent case involving the Federal Communications Act, this Court ruled that where the Supreme Court of Nebraska held that parties by their pleadings had conceded that the Federal Communications Commission had no jurisdiction of the controversy submitted to the State Court for decision, that this Court could not on certiorari determine the correctness of such holding. See *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120; 89 *L. Ed.* 2092. In that case, Mr. Justice Frankfurter also spoke for the Court of

> ". . . the well settled rule whereby this Court will not review a state Court decision resting on adequate and independent non-Federal grounds even though the State Court may have also summoned to its support an erroneous view of Federal Law."

The Decisions Under the Conformity Act

We do not contest the right of Congress to require State

Courts to try Federal Employer's Liability Act cases by any reasonable rule of procedure it may adopt. But in the absence of any such mandate from Congress, we assert that the Court has hitherto held that State rules of practice and procedure were to be applied in these cases. These matters of procedure include rules of construction of pleading, though of course they do not include the question of the sufficiency of pleadings, when construed, to state a cause of action. That the *rule* of pleading construction is a procedural matter can be nowhere better observed than in the judicial construction of the Old Conformity Act, *Title* 28 *U. S. C. A.*, Section 724. That Act declared:

> "The practice, pleadings and forms and modes of proceeding in civil causes . . ., shall conform, as near as may be, to the practice pleadings, and forms and modes of proceeding existing at the time in like cause is the courts of record of the State . . ."

Under the Act this Court has held:

> That the Federal Courts will follow a rule of construction in the State Courts, that where an answer sets up several distinct defenses, a denial in one is held to be qualified by an admission in another. *Northern Pac. R. Co.* v. *Payne*, 119 U. S. 561, 30 L. Ed. 513.

Also,

> That when a state code has relaxed the strictness of common law rules of pleading so that, instead of construing pleading strictly against the party, they are to be construed liberally in his favor, such a rule of construction will be observed in the U. S. Courts in that state. *U. S.* v. *Parker*, 120 U. S. 89; 30 L. Ed. 601.

See also *Connolly* v. *Std. Oil Co.*, 264 Fed. 383; *Bryson* v. *Gallo*, 180 Fed. 70.

If the matters of pleading construction were matters of form and procedure within the meaning of the Conformity Act, they are not otherwise in the case at Bar.

THE CASE PRESENTS NO CONFLICT WITH DECISIONS OF THIS COURT

The allegations of the petition in this record, construed according to unvarying Georgia Practice, present to the Court a case in which no negligence is charged.

Liability under the Federal Employer's Liability Act rests upon fault, that is upon defendant's negligence. See *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 88 L. Ed. 239. A defendant railroad is not negligent because a large clinker comes momentarily to rest in a railroad yard, without having been placed there by the defendant or its agent. No decision of this Court supports the contention that such allegations set forth a cause of action under the Federal Employer's Liability Act.

On the other hand, *Waller* v. *Northern Pacific Terminal Co. of Ore.*, 166 Pac. (2) 488, (Certiorari denied 329 *U. S.* 742; 67 *S. Ct.* 45,) supports our assertion that such facts do not constitute a cause of action. In the Waller case an employee allegedly slipped and fell on a stick in the terminal yards. There was a verdict and judgment for the plaintiff which the appellate court reversed because:

> "Assuming that the plaintiff slipped by stepping on a stick, there is not a scintilla of evidence to indicate how long the stick had been there. From all that appears from the evidence, it may have fallen from the train which the plaintiff was boarding." (See also our discussion of the Waller case, page 21 of previous brief of Respondent.)

We do not see how a discussion of the recent cases decided by this Court under the Federal Employer's Liability Act would be helpful in the disposition of this case. These recent cases were known and cited to the Georgia Courts which acknowledged their controlling effect. (R. 7.) But none of these cases make defendants insurers, see *Tiller v. A. C. L. R. Co.*, 318 U. S. 54; 87 *L. Ed.* 610. Furthermore, it has been thoroughly ac-

cepted by a majority of this Court that every claim does not present a jury question under the Act. See *Brady* v. *Sou. Ry. Co.*, 320 U. S. 476; 88 *L. Ed.* 239; *Hunter* v. *Texas Elec. Ry. Co.*, 332 U. S. 827; 92 *L. Ed.* 402; *Eckenrode* v. *Penn. R. Co.*, U. S. ; 93 *L. Ed.* 64; *Reynolds v. A. C. L. Ry. Co.*, U. S. ; 93 *L. Ed.* 475. (References to L. Ed. Advance Opinions.)

This Court has certainly adopted the principle that jury verdicts may be supported by certain inferences from evidence (*Lavender* v. *Kurn, supra.*), but it has never announced that State rules of pleading must be varied so as to permit pleading by inference contrary to state practice.

Indeed, we cannot find any decision of this Court with which the decision of the Georgia Court of Appeals is in conflict. The theory of cases cited by Petitioner have been dealt with at page 21 of Respondent's Brief heretofore filed in this cause.

Granting of the Writ

With great respect for the Court, we venture to submit that certiorari was, in this case, improvidently granted, and for that reason should now be dismissed. For that dismissal we move and show in connection with the motion, the following authority:

It has been several times held by this Court, that where the Court has granted certiorari, the same will, even after a consideration of the case on its merits, be dismissed as improvidently granted where it appears that no grounds existed for the original grant. See *Layne & Bowler Corp* v. *Western Well Works, Inc.*, 261 U. S. 387; 67 *L. Ed.*, 712; *United States* v. *Rimer, et al.*, 220 U. S. 547; 55 *L. Ed.* 578; *Furness, W. & Co.* v. *Yang-Tsze Ins. Asso.*, 242 U. S. 430; 61 *L. Ed.* 409.

The case presented by the Record herein is purely a matter involving "no more than its particular facts." (See the concurring opinion of Mr. Justice Frankfurter in *Wilkerson* v.

McCarthy, U. S. ; 93 *L. Ed.* 403. (Advance Opinions.)

The principle on which writs of certiorari have been granted by this Court was well stated by Mr. Chief Justice Taft in dismissing the improvidently granted writ in the *Layne & Bowler case, supra.*:

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head." 67 L. Ed. 714.

See also the opinion of Mr. Justice Roberts, *Bailey* v. *Cent. Vt. R. Co.*, 319 U. S. 350; 87 *L. Ed.*, 1444 at 1448.

We assert that the construction given the particular language used by a particular counsel in a petition construed regularly according to the unvarying state practice in a State Court does not present to the Supreme Court of the United States any matter of public gravity or importance. Nor is there any principle of law announced in the decision which conflicts with the decisions of this Court or with the Courts which have generally construed the Federal Employers Liability Act. The one rule of substance announced by the decision is that liability under the Federal Employer's Liability Act must be based on some fault; and the one rule of practice is that the State Courts of Georgia construe pleadings against pleaders. Both of these rules are correct statements of law.

We call the Courts attention to the recent case *Chester Hedgebeth* v. *North Carolina*, 334 U. S. 806; 92 *L. Ed.*, 1739. In that case, this Court dealing with a case involving conviction

of robbery, wherein the 14th Amendment was invoked, and a man's liberty at stake, dismissed the writ of certiorari because the State Supreme Court "went on the ground that it did not have the full record before it" and therefore judgment below "can rest on a non-federal ground."

Judgment below on the Record now before the Court not only can but does most positively rest on a non-federal ground.

Conclusion

Whether the Court disposes of this case by dismissing the Writ or by considering the Record on its merits, we respectfully assert that this is a case for affirming the State Court decision. The principles of law announced in the decision were accurate, and indeed hardly questionable. The actual matter presented here involved the construction of pleadings in a petition. The State Court construed the pleadings by its unvarying rule. No charge is made that the Court attempted by its construction to evade a Federal right of petitioner. The question presented is therefore, non-federal.

In any event, the case involved only its particular facts.

We respectfully pray, therefore for an order dismissing the writ or sustaining the decision of the Georgia Court of Appeals.

Respectfully submitted,

ARTHUR HEYMAN,
HUGH HOWELL, SR.,
HERMAN HEYMAN,
MORRIS B. ABRAM,
Attorneys for Respondent.

HEYMAN, HOWELL & HEYMAN,
511 Connally Building,
Atlanta, Georgia.
STEINER CRUM & WEIL,
Montgomery, Alabama.